No. 86-291

FILED
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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GEORGE SUMNER, Director,
Nevada Department of Prisons,

*Petitioner,*

v.

CHARLES ALBERT PHELPS,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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GEORGE SUMNER, DIRECTOR,
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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED[1]

I. Whether a habeas petitioner claiming that he was denied the effective assistance of counsel must allege before the federal district court how his counsel erred and how he was prejudiced by counsel's performance.

II. Whether a federal appellate court should consider unexhausted issues raised for the first time on appeal by a habeas petitioner-appellant and remand to allow amendment of the petition to exclude those issues or to allow the petitioner to return to state court to exhaust the new issues.

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[1] Petitioner points out to this Court that the questions presented in this petition are almost identical to the issues presented to this Court in McCotter v. Petty, No. 85-1656, certiorari granted, 54 U.S.L.W. 3858 (U.S. 1986).

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

---

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW GEORGE SUMNER, Director, Nevada Department of Prisons, Petitioner[2]

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[2] Petitioner Sumner is hereinafter referred to as the State as the real party in interest. Respondent in this Court, and petitioner-appellant below, Charles

herein, by and through his counsel, the Attorney General of Nevada, and files this Petition for Writ of Certiorari.

## OPINIONS AND JUDGMENTS BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit was filed on June 10, 1986, and is reproduced herein in Appendix E. Phelps v. Sumner, Case No. 85-2377, Memorandum (9th Cir. 1986) (unpublished). The Order Denying Rehearing is attached as Appendix F. The federal district court report and recommendation is produced as Appendix B and the order of dismissal is reproduced as Appendix C. Phelps v. Housewright, Case No. CV-R-84-340-ECR (D.Nev., entered Jul. 15, 1985) (unpublished).

## JURISDICTION

The federal district court reviewed

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Albert Phelps, will be referred to as Phelps.

the matter filed as a habeas corpus petition. See 28 U.S.C. §§ 1331, 2241, 2254. An appeal was taken by Phelps. See 28 U.S.C. §§ 1291, 2253. The judgment of the Court of Appeals for the Ninth Circuit was filed on June 10, 1986. A timely-filed petition for rehearing was filed by the State on June 24, 1986. The order of the Court of Appeals for the Ninth Circuit denying rehearing was filed on July 3, 1986. This petition for writ of certiorari is filed within sixty days after the denial of rehearing by the court below. Sup.Ct.R. 20. The jurisdiction of this Court is invoked under section 1254(1) of Title 28 to the United States Code.

## STATUTORY PROVISIONS INVOLVED

Because this action concerns pleadings and review of a habeas corpus matter, rules for federal habeas actions are involved. Rules Governing Section

2254 Cases in the United States District Courts, 28 U.S.C. Fol. § 2254, Rules 2(c), 4, 8(a), 9(b) (reprinted in Appendix G).

## STATEMENT OF THE CASE

The State has lawful custody of Phelps pursuant to felony convictions entered in 1981 for sexual assault, attempted sexual assault and two counts of lewdness with a child under the age of fourteen years. Following a jury trial, Phelps was sentenced to life without the possibility of parole on the first count, ten years on count II and five years each on counts III and IV with all sentences to run concurrent. He will not be eligible for parole on his life term until he has served ten years in prison. State of Nevada v. Phelps, Case No. C80-1592, Judgment (Nev. 2nd Jud.Dist.Ct., filed May 8, 1981); id., Corrected Judgment (filed Apr. 19, 1984).

Phelps appealed to the Nevada Supreme

Court and claimed that the trial court erred in permitting the joinder of the sexual assault charges and lewdness charges and also challenged the admissibility of his statement to the police claiming that it was not voluntary. The Nevada Supreme Court ordered the appeal dismissed finding no merit to the claims. Phelps v. State of Nevada, Case No. 13501, Order Dismissing Appeal (Nev., filed Dec. 20, 1983) (unpublished order).

In March of 1984, Phelps filed a petition for writ of habeas corpus in the United States District Court for the District of Nevada setting forth the two claims raised in his direct appeal and setting forth four additional grounds. The federal court subsequently ordered Phelps to demonstrate that he had exhausted the later four claims and, following a request by Phelps that the federal petition remain dormant pending

his exhaustion of state remedies, the federal court entered its order of dismissal without prejudice. Phelps v. Housewright, Case No. CV-R-84-76-ECR, Order (D.Nev., filed Apr. 20, 1984) (unpublished order).

In order to exhaust state court remedies, Phelps filed a petition for writ of habeas corpus in a state district court in Carson City. Phelps v. Housewright, Case No. H-50699, Petition for Writ of Habeas Corpus (Nev. 1st Jud.Dist.Ct., filed Apr. 16, 1984). The state habeas corpus court denied the petition finding that some of the issues raised had already been decided on direct appeal and, in any event, all of the issues raised by Phelps in the state habeas petition could have been raised on direct appeal and, because they were not, were considered waived. Id., Order Denying Petition for Writ of Habeas Corpus (filed May 11, 1984).

Phelps' appeal to the state supreme court was dismissed by that court which found a proper denial by the state habeas court. Phelps v. Director, Nev. Dept. of Prisons, Case No. 15794, Order Dismissing Appeal (Nev. filed Jul. 20, 1984) (unpublished order).

Phelps next brought a federal habeas petition which is the basis of the present action before this Court. He raised the same claims raised before the state habeas court. Phelps v. Housewright, Case No. CV-R-84-340-ECR, Petition for a Writ of Habeas Corpus . . . (D.Nev., filed Aug. 15, 1984) (reproduced in pertinent part herein as Appendix A). In both the state habeas proceedings and the federal habeas proceeding, Phelps did not claim that his trial counsel was ineffective for having failed to make a proper opening statement or for having failed to make any closing argument. After the State filed its

answer, the magistrate and the district court ruled on the merits regarding the two claims raised previously by Phelps on direct appeal to the state supreme court. The magistrate and federal court also determined that the remaining four claims were barred due to procedural default but made a ruling on the merits of the claims in any event. (Appendices B and C).

Phelps appealed to the Court of Appeals for the Ninth Circuit and counsel was appointed for the first time on appeal. The court of appeals also granted an application for certificate of probable cause which had been previously denied by the federal district court. The brief for Phelps on appeal raised for the first time a claim of ineffective assistance of counsel for failure to make an adequate opening statement or to make any closing argument. Phelps also claimed that the federal district court erred in failing to

hold an evidentiary hearing on the general claim of ineffective assistance of counsel and that the district court erred in denying the petition claiming a violation of due process with regard to a jury instruction on reasonable doubt. See Phelps v. Housewright, Case No. 85-2377, Appellant's Opening Brief (9th Cir., filed Nov., 1985) (cover and table of contents reproduced as Appendix D). The State filed its brief and objected to the court of appeals hearing the claim of ineffective counsel regarding opening statement or closing argument for the first time on appeal, argued that the dismissal of the habeas petition without a hearing was appropriate, and stated that the claim of an improper jury instruction on reasonable doubt could not be heard due to the procedural default of Phelps.

The Court of Appeals for the Ninth Circuit noted the claims made by Phelps on

appeal but only addressed the new claim of ineffective assistance of counsel raised for the first time on appeal. With regard to this claim, the court noted that issues not raised below are generally not considered on appeal although a court of appeals has some discretion to hear such issues in narrow circumstances. The court also stated that it was following the decision of this Court in Rose v. Lundy, 455 U.S. 509 (1982), and apparently considered the petition to be "mixed." Accordingly, the court of appeals concluded,

> We therefore remand to the district court to permit Phelps to return to state court to exhaust his new claim of ineffective assistance of counsel or to amend and resubmit the habeas petition so as to present only exhausted claims to the district court.
>
> Remanded.

Phelps v. Sumner, Case No. 85-2377, Memorandum at 4-5 (9th Cir. 1986)

(unpublished order) (Appendix E).

The State timely filed a petition for rehearing raising the questions presented in the instant petition. Id., Petition for Rehearing (filed Jun. 24, 1986). The Court of Appeals summarily denied rehearing on July 3, 1986. On July 9, 1986, the State timely filed a Motion to Stay Issuance of the Mandate. The Ninth Circuit summarily denied this motion on July 15, 1986.

## SUMMARY OF THE ARGUMENT

There are special and important reasons for granting the writ. The Ninth Circuit Court of Appeals in essence determined that a federal habeas petitioner need not plead attorney error and prejudice before the federal district court and that, if such a claim is made for the first time on appeal, the federal habeas petitioner will be considered to have filed a "mixed petition." This

result is completely contrary to the decisions of this Court in Hill v. Lockhart, ____ U.S. ____, 106 S.Ct. 366 (1985); Strickland v. Washington, ___ U.S. ____, 104 S.Ct. 2052 (1984), and Rose v. Lundy, 455 U.S. 509 (1982). This Court should grant certiorari, reverse the decision of the Ninth Circuit and order an affirmance of the district court decision.

The Ninth Circuit Court of Appeals also engaged in a radical departure from established appellate procedure in its treatment of the issues Phelps raised for the first time on appeal. By remanding, the Ninth Circuit made an erroneous determination to exercise its discretion to hear an issue raised for the first time on appeal even though the new claim of ineffective counsel was not purely legal and the record below was not fully developed regarding the issue. The

opinion of the Ninth Circuit, if allowed to stand, will detrimentally affect the manner in which habeas petitions are handled in that circuit as a district court will not be able to predict what new claims might be raised on appeal and remands would be allowed depriving district court judgments of finality. Such a decision would also require that a state litigate additional claims in numerous proceedings and will frustrate the interests of justice.

## REASONS FOR GRANTING THE WRIT

### I. A HABEAS PETITIONER CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL MUST SPECIFICALLY PLEAD ATTORNEY ERROR AND PREJUDICE.

In his federal habeas petition, Phelps claimed that the state trial court erred in permitting a joinder of charges and that the trial court erroneously admitted an involuntary statement made by Phelps. The additional claims were made

in an affidavit attached to the habeas petition and, liberally construed, were claims of ineffective assistance of counsel. Phelps claimed error in jury instructions and remarks by the trial judge. He also said counsel was ineffective in that he wanted his counsel to make a discovery motion before trial, to make a motion to suppress hearsay evidence, to investigate Phelps' past, to argue something about a statement made by Phelps without a lawyer and to object to parts of testimony of a city detective and Phelps' ex-wife as perjury. These specific claims of ineffective counsel were not raised by Phelps before the Ninth Circuit. Rather, before that court, Phelps raised for the first time the specific claim of ineffective trial counsel in making a short opening statement and in failing to make a closing argument.

This Court has previously stated that a habeas petitioner "making a claim of ineffective assistance of counsel, must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland v. Washington, ___ U.S. at ____, 104 S.Ct. at 2066. Additionally, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at _____, 104 S.Ct. at 2068. This standard was reiterated in a subsequent case where this Court, in the context of guilty plea challenges based on ineffective counsel, stated that the habeas petitioner's allegations were insufficient to satisfy the Strickland requirement of "prejudice." This was because the petitioner "did not allege in his habeas petition that, had counsel

correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." Hill v. Lockhart, ____ U.S. at ____, 106 S.Ct. at 371 (emphasis added). As such, this Court found that the district court did not error in declining to hold a hearing on the claim of ineffective assistance of counsel.

The decision of the Ninth Circuit Court of Appeals is clearly in conflict with the previous decisions of this Court. It is also in conflict with the decisions of other federal courts of appeals which have held that claims of attorney error and prejudice must be specifically pled. See, e.g., United States v. Giangrosso, 779 F.2d 376, 381 (7th Cir. 1986); Beard v. Lockhart, 779 F.2d 23, 26 (8th Cir. 1985); Siers v. Ryan, 773 F.2d 37, 45 (3d Cir. 1985). Nevertheless, the decision of the Ninth Circuit Court of Appeals in this

case appears to be in line with another decision of the Fifth Circuit Court of Appeals. See Petty v. McCotter, 779 F.2d 299, 302 (5th Cir. 1986), cert. granted, 54 U.S.L.W. 3858 (U.S., No. 85-1656, June 20, 1986). In Petty, a habeas petitioner failed to allege prejudice with regard to a specified claim of attorney error. After the district court denied relief, the Fifth Circuit Court of Appeals remanded the matter for an evidentiary hearing and held that Strickland requires that prejudice be proved but not pleaded. The State of Nevada here contends that the decision of the Fifth Circuit Court of Appeals was also erroneous.

The habeas petition filed in the district court below in this case did make specific allegations of attorney error which were then reviewed and rejected by the district court. By allowing a habeas appellant to make claims for the first

time on appeal, the requirements stated in Strickland and Hill will be emasculated such that habeas petitioners can think of new claims if they did not prevail on claims originally presented to the district court. Strickland and Hill require that a habeas petition initially filed in the district court is the document which must specifically identify the errors of counsel and prejudice resulting from any errors. To allow otherwise would be to give habeas petitioners an unwarranted opportunity to begin anew in the appellate courts.

## II. AN UNEXHAUSTED CLAIM OF INEFFECTIVE COUNSEL RAISED FOR THE FIRST TIME ON APPEAL SHOULD NOT BE CONSIDERED BY A FEDERAL APPELLATE COURT.

### A. The Ninth Circuit Erroneously Concluded that an Unexhausted Ineffective Counsel Claim Raised First on Appeal Creates a "Mixed Petition."

The memorandum decision of the Ninth

Circuit also stated that the treatment of Phelps' claim of ineffective counsel raised for the first time on appeal must follow the direction of this Court in Rose v. Lundy, 455 U.S. 509 (1982). That decision stated the rule that, when a claim not previously raised in state courts appears in a federal habeas petition, the petition is "mixed" and a prisoner must be given the choice of returning to state courts to exhaust the claim or of amending and resubmitting the petition to present only exhausted claims. Id. at 510.

The case presented to the Ninth Circuit, however, did not pose the same situation which was presented in Rose v. Lundy. In this case, the petition filed with the federal district court clearly contained only claims which had been previously exhausted in the state courts. Accordingly, the federal court properly

addressed each of those claims. The Ninth Circuit improperly characterized the situation as a "mixed petition" as described in Rose v. Lundy. This was directly contrary to the decision of this Court which held "that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." Rose v. Lundy, 455 U.S. at 522 (emphasis added). That opinion did not hold that federal appellate courts were to require remand and dismissal of the habeas petition when an unexhausted claim was raised for the first time on appeal.

B. The Ninth Circuit's Decision to Consider the New Claim of Ineffective Counsel is a Radical Departure from Settled Appellate Procedure.

The Ninth Circuit Court of Appeals acknowledged in its memorandum opinion that the new claim of ineffective counsel regarding an opening statement or closing

argument was a new claim raised for the first time on appeal. The court also said that issues not raised below are generally not considered on appeal "although a court 'may exercise [its] discretion to hear such an issue in some narrow circumstances.'" Phelps v. Sumner, Case No. 85-2377, Memorandum at 4 (9th Cir., filed Jun. 10, 1986) (Appendix E). The court of appeals, however, erroneously considered the situation presented to it to be one in which it could properly exercise its discretion.

Principles of appellate review clearly state that issues not raised in or considered by the court below will not be allowed on appeal. See, e.g., Delta Air Lines, Inc. v. August, 450 U.S. 346, 362 (1981); Taylor v. Sentry Life Insurance Company, 729 F.2d 652, 655-56 (9th Cir. 1984) (per curiam), cited in Kuntz v. Reese, 760 F.2d 926, 936 (9th Cir. 1985).

The exercise of discretion to hear an issue raised for the first time on appeal arises only if the matter is purely legal, the record below is fully developed, and the question is one of importance to the public. Kuntz v. Reese, 760 F.2d at 936, citing In re Howell, 731 F.2d 624, 627 (9th Cir.), cert. denied, _____ U.S. _____, 105 S.Ct. 330 (1984).

In this particular case, the issues raised by Phelps for the first time on appeal to the Ninth Circuit were not purely legal matters as they raised a claim of ineffective counsel. A proper consideration of these claims involves factual matters which must be resolved with a hearing. And, because these new claims were not presented to the state courts, see 28 U.S.C. § 2254(b),(c), Phelps would be required to exhaust his state court remedies under Rose v. Lundy. The decision of the Ninth Circuit would,

as stated by the petitioner in McCotter v. Petty, work "to perpetuate [the habeas] action in both the state and federal system. It thus disserves valid interests in the orderly administration of justice and . . . frustrates the screening process entrusted to the district courts by the habeas rules." McCotter v. Petty, Case No. 85-1656, Petition for Writ of Certiorari . . . at 9 (U.S., filed 1986).

C. The Remand by the Ninth Circuit Deprives the State of an Opportunity to Plead Procedural Bars and Frustrates the Interests of Justice.

The decision of the Ninth Circuit Court of Appeals was to remand to the district court to allow Phelps to return to state court to exhaust his new claim of ineffective counsel or to amend and resubmit his habeas petition so as to present only exhausted claims to the district court. In the first place, the

habeas petition presented to the district court did in fact present only exhausted claims. Secondly, if appellant is allowed to return to state court, there is no question that the Nevada state courts would now reject a successive petition with this new claim. See Darnell v. State, 98 Nev. 518, 520-21, 654 P.2d 1009, 1011 (1982); Nev. Rev. Stat. § 34.810 (1985). Then, upon return to the federal courts, Phelps' procedural default would preclude a review of the merits of his new claim of ineffective counsel. See Engle v. Isaac, 456 U.S. 107, 116, 117-18, 128-29, 135 (1982), citing Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977).

A remand would also mean that the decision on the present claims made by petitioner would not be final. If for some reason Phelps decided on remand not to return to state courts to exhaust his new claim, the district court would have

to reenter its order dismissing the petition and the case would again be before the court of appeals. If Phelps did decide to exhaust his new claim in state courts, the federal habeas petition would have to be held in abeyance even though all other issues had been previously decided. Then, once the new claims were exhausted, Phelps would apparently be allowed to amend his pending federal petition. At that time, the State would not be able to plead a defense of abuse of the writ. See 28 U.S.C. fol. § 2254, Rule 9(b). The proper decision would be to disallow the new claim raised for the first time on appeal and require that Phelps file a separate habeas application. See Jones v. Parke, 734 F.2d 1142, 1145 (6th Cir. 1984).

Notably, the decision of the Ninth Circuit was directly contrary to another decision of that court which stated that a

new fact or issue could not be raised for the first time on appeal in a habeas action. See Powell v. Spalding, 679 F.2d 163, 167 (9th Cir. 1982) (citing cases). The decision was also contrary to the decisions of other federal courts of appeals. See, e.g., Alexander v. McCotter, 775 F.2d 595, 603 (5th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204-05 (8th Cir. 1985); Spann v. Wainwright, 742 F.2d 606, 607 (11th Cir. 1984), cert. denied, ____ U.S. ____, 106 S.Ct. 95 (1985). But see, Petty v. McCotter, 779 F.2d 299, 302 (5th Cir. 1986), cert. granted, 54 U.S.L.W. 3858 (U.S., No. 85-1656, June 20, 1986).

The remand ordered by the court of appeals will result in an unnecessary increase in workload for courts and attorneys and may encourage the withholding of habeas claims until appeal. "Every inroad on the concept of finality

undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." Hill v. Lockhart, ____ U.S. at ____, 106 S.Ct. at 370, quoting United States v. Timmreck, 441 U.S. 780, 784 (1979); United States v. Smith, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens, J., dissenting).

## CONCLUSION

For the reasons stated above, petitioner asks that the petition for writ of certiorari to the Court of Appeals for the Ninth Circuit issue and that the action of that court be reversed. Petitioner here respectfully suggests that this Court grant this petition for writ of certiorari and consider consolidating this matter with McCotter v. Petty, No. 85-1656 (U.S.) (certiorari granted), for the purpose of argument. Petitioner will then ask that

the decision of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted.

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# APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

| | |
|---|---|
| CHARLES ALBERT PHELPS, Petitioner, v. VERNON HOUSEWRIGHT, Warden, and Attorney General of the State of Nevada, BRIAN McKAY, Respondents. | Case No. CV-R-84-340-ECR [Filed Aug. 15, 1984] |

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY

. . . .

A)(1) Ground One: Trial Court erred in permitting joinder of the sexual assualt charges and the lewdness charges.

(2) Supporting Facts: (Without citing legal authority or argument, state briefly the facts which support your claim)

The charged offenses, four counts/ are alledged to have occured; Febuary

1980; May 1980; and August 1980, all seperate occasions.

. . . .

B)(1) Ground Two: My statement to police WAS NOT VOLUNTARY and its admission into evidence was reversible error.

(2) Supporting Facts: (Without citing legal authority or argument, state briefly the facts which support your claim)

I asked for an attorney because, I didn't understand all the questions; and was told maybe later.

. . . .

C)(1) Ground Three: THRU GROUND SIX (6), SEE: ATTACHED AFFIDAVIT

. . . .

AFFIDAVIT

State of Nevada )
) ss.
Carson City County )

COMES NOW, Charles Albert Phelps, Affaiant who states to this court, that he attempted to have his court appointed

attorney supplement his state appeal, and opening brief with the following issues:

(3) That court appointed counsel told me the issues I wanted him to raise were frivolous and bullshit and he wasn't going to be bothered. The issues I wanted to raise are;

(4) Jury Instructions Number 11, 12, Reasonable Doubt - deprived me of a fair trail. The instructions to me said nothing about burden of proof and misled the jury and left me to prove my innocence and not the state to prove me guilty.

(5) Trail judge made remarks about me during the trail; I believe he intimidated the jury into finding me guilty of all counts.

(6) Trail counsel was ineffective and incompetent in his assistance to me;

I asked him to make a discovery motion before trail, to make a motion to surpress hearsay evidence, to investigate

my past, about my statement without a lawyer to help me to object to parts of the testimony as perjury, the sparks detective, and my ex-wifes testimony,

So Saith Affiant,

Dated This 5th Day of March, 1984.

/s/
Mr. Charles Albert Phelps, 15673

. . . .

[Notary]

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | |
|---|---|
| CHARLES ALBERT PHELPS,<br><br>Petitioner,<br><br>v.<br><br>VERNON HOUSEWRIGHT, et al.,<br><br>Respondents. | Case No. CV-R-84-340-ECR<br><br>MAGISTRATE'S REPORT AND RECOMMENDATION [Filed June 21, 1985] |

This report and recommendation is made to the Honorable Edward C. Reed, Jr., United States District Judge, pursuant to 28 U.S.C. §636(b)(1)(B). This report and recommendation addresses petitioner's Petition for a Writ of Habeas Corpus (filed August 15, 1984 - court docket #1).

On November 30, 1984, respondents filed an Answer (court docket #8). Respondents have also filed, upon Order of the court, a copy of the trial transcript. (Court docket #11). On May 6, 1985,

petitioner filed a document which may best be described as a Motion for "Acceptance of further information and points and authorities in support of" petitioner's petition. (Court docket #14). This document does not reflect proof of service, and will not be considered by the court. The court has considered all other pleadings, motions and the trial transcript.

Petitioner is presently incarcerated at the Northern Nevada Correctional Center in Carson City, Nevada. Petitioner is serving concurrent sentences of: life with the possibility of parole after service of ten years, ten years, five years and five years. These sentences were imposed following petitioner's conviction of sexual assault on a child under the age of fourteen, attempted sexual assault and two counts of lewdness with a child under the age of fourteen.

Respondents state that it is clear that petitioner has exhausted his state court remedies with regard to his claims for relief. Respondents' Answer at p. 5 (court docket #8).

Ground one of petitioner's petition alleges that the "trial court erred in permitting joinder of the sexual assault charges and the lewdness charges." Petitioner's supporting facts: "The charged offenses, four counts are alleged to have occurred February 1980, May 1980, and August 1980, all separate occasions." Petition at 3 (court docket #1).

The scope of federal court review of a state prisoner's habeas corpus petition is to determine whether petitioner received an unfair trial under the federal Constitution. State law review is "not the task of a federal court and is superfluous..." Bashor v. Riley, 730 F.2d 1228, 1233, n. 1 (9th Cir. 1984). The

Nevada Supreme Court concluded that as a matter of state law the four counts were properly joined in the same indictment. The court stated that under NRS 173.155(2), the four counts were properly joined since the four acts "appear to have been part of the same continuing common scheme or plan." Phelps v. State of Nevada, Case No. 13501, Order dismissing appeal at 1 (Dec. 20, 1983). The court also concluded that petitioner's "ability to defend against the two sexual assault charges was not prejudiced by the joinder of the lewdness offenses, since evidence of the lewdness offenses would have otherwise been admissible at a trial on the sexual assault charges, under the common scheme or plan exception to NRS 48.045(2)."

The court is satisfied that joinder of the offenses pursuant to Nevada statutory law did not deprive petitioner

of any constitutional right. The assumption underlying the State's joinder of the offenses; i.e., that petitioner was not prejudiced since evidence of each offense would have been admissible in separate trials if severence had occurred, is a matter of state law and procedure and does not involve federal constitutional issues. Bashor, supra. It is noted that these offenses would no doubt have been admissible in one trial under Federal Rules of Evidence 404(b). Petitioner has cited no authority for his position. Therefore, ground one of the instant petition provides no basis for federal habeas corpus relief.

Ground two of the instant petition appears as follows: "My statement to police WAS NOT VOLUNTARY and its admission into evidence was reversible error." The supporting facts: "I asked for an attorney because, I didn't understand all the

questions; and was told maybe later."

The state trial court held a hearing outside the presence of the jury to determine the voluntariness of petitioner's statements at which Phelps testified. Tr. vol. I at 7-18 and vol. II at 20-106 (court docket #11). This hearing concerned circumstances surrounding the arrest and subsequent statements of petitioner. The Nevada Supreme Court examined the record and concluded that the record contained substantial evidence to support the trial judge's determination that the confession was made voluntarily. Id. at 2. This court concurs with the Nevada Supreme Court's conclusion. As noted by the Nevada Supreme Court, the record contains evidence that petitioner "appeared 'alert' and 'normal' at the time of the interrogation, and that [petitioner] appeared to understand what he was saying at this time." Id.; Tr. vol. II at 24 &

The undersigned also notes that the record contains evidence to show that the arrest of petitioner by his probation officer was supported by probable cause. Tr. vol. II at 93 (testimony of Officer Williams). The record also contains evidence which shows Petitioner signed a written waiver of his Miranda rights, following receipt of the same. Tr. vol. II, at 23. A psychologist and a psychiatrist testified on behalf of Phelps concerning whether his mental condition or emotional state would have prevented him from understanding what he was doing or have the ability to make the confession. The record amply supports the trial court's finding that petitioner's statement was voluntary.

The court now turns to petitioner's specific allegation that he requested counsel and was told "maybe later." The

court's review of the record has found no support for said allegation. Petitioner's own testimony, given outside the presence of the jury, did not raise the facts now alleged. In fact his testimony at the time was that he did not remember what did happen. See Tr. vol. II at 35-57. 28 U.S.C. §2254(d) provides that "a determination after a hearing on the merits of a factual issue, made by a State court... shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear..." that one of eight exceptions is satisfied. Clearly, petitioner's present allegations are within the scope of facts which the trial court would have considered during a hearing to determine the voluntariness of petitioner's statements. However, the court's review of the record has found no support whatsoever for petitioner's present allegations. The time to assert such facts

came long ago. Therefore, ground two of the instant petition provides no basis for federal habeas corpus relief.

Petitioner also alleges that "Jury Instructions Number 11 [and] 12, Reasonable Doubt - deprived me of a fair trial. The instructions to me said nothing about burden of proof and misled the jury and left me to prove my innocence and not the state to prove me guilty." Petitioner, Exb. "C" (court docket #1). Petitioner also asserts that the "trial judge made remarks about me during the trial; I believe he intimidated the jury into finding me guilty of all counts." Finally, petitioner alleges that "trial counsel was ineffective and incompetent in his assistance to me; I asked him to make a discovery motion before trial, to make a motion to suppress hearsay evidence, to investigate my past, about my statement without a lawyer to help me to object to parts of

the testimony as perjury, the Sparks detective, and my ex-wife's testimony." Petitioner, Exb. "C" (court docket #1). These issues were not raised by petitioner on direct appeal. See Orders by State courts denying petition for writ of habeas corpus and order dismissing appeal (attachments to Petition, court docket #1).

These claims are apparently barred under the holding of Engle v. Isaac, 456 U.S. 107, 110, 129 (1982), since petitioner, after a "state procedural default" has not "demonstrated cause and actual prejudice." In any case, petitioner's claim as to the jury instructions is simply factually incorrect. Instructions eleven and twelve, to which petitioner attributed fault, clearly defined "reasonable doubt," and instructed the jury that "[t]he burden rests upon the prosecution to prove every element of the crime with

which the defendant is charged, and every element of the crime must be prove [sic] beyond a reasonable doubt." Exhibit "M" to respondents' Answer (court docket #8); see also id. at exhibit "L" (using definition of reasonable doubt required by NRS 175.211). Accordingly, the jury instructions give at petitioner's trial do not provide a basis for federal habeas corpus relief.

Petitioner's claim concerning remarks made by the trial judge does not allege facts from which the court may infer that petitioner was tried before a hostile jury or that petitioner's constitutional rights were prejudically impacted. See Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984). Petitioner has not cited the court to any specific portion of the record containing prejudicial comments; nor has the court's independent review of the record revealed any such comments. Therefore,

petitioner's claim that the judge intimidated the jury into finding him guilty does not provide a basis for federal habeas corpus relief.

Finally, petitioner's claim concerning his attorney's failure to pursue certain avenues allegedly requested by petitioner, does not provide a basis for habeas relief. Petitioner's allegations concerning his attorney's omissions are nothing more than non-particularized assertions of perceived tactical errors, and as such cannot form the basis for federal habeas relief. See Rutledge v. Wainwright, 625 F.2d 1200, 1203 (5th Cir. 1980, cert. denied, 450 U.S. 1033 (1981); Bashor, supra.

RECOMMENDATION

Based on the foregoing, it is recommended that petitioner's petition for a writ of habeas corpus be denied.

DATED this 21st day of JUNE, 1985.

/s/ Phyllis Halsey Atkins
United States Magistrate

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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|---|---|
| CHARLES ALBERT PHELPS,<br><br>Petitioner,<br><br>v.<br><br>VERNON HOUSEWRIGHT, et al.,<br><br>Respondents. | Case No. CV-R-84-340-ECR<br><br><br><br>ORDER<br>[Entered July 15, 1985] |

The court having reviewed the report and recommendation of the magistrate filed herein June 21, 1985, regarding petitioner's Petition for a Writ of Habeas Corpus (filed August 15, 1984 - court docket #1), and no objections having been filed thereto,

IT IS HEREBY ORDERED:

1. The magistrate's recommendation is hereby adopted;

2. Petitioner's petition for a writ of habeas corpus is denied.

Dated this 9th day of JULY, 1985.

/s/ Edward C. Reed
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| CHARLES ALBERT PHELPS, | No. 85-2377 |
| | DC # |
| Petitioner-Appellant, | CV-R-84-340-ECR |
| | NEVADA (RENO) |
| v. | |
| VERNON G. HOUSEWRIGHT, Director of Prisons, and BRIAN McKAY, Attorney General of the State of Nevada, | |
| Respondent-Appellees. | |

Appeal From The United States District

Court For The District of Nevada

The Honorable Edward C. Reed, Jr., Judge

APPELLANT'S OPENING BRIEF

Jeffrey M. Evans
401 West Second Street
Reno, Nevada 89503
(702) 348-7760
Attorney for Appellant

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. . . .

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE GRANTED PHELPS' PETITION BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS APPOINTED STATE TRIAL ATTORNEY'S FAILURE TO ADDRESS THE JURY IN OPENING STATEMENT OR CLOSING ARGUMENT.

A. The Failure Of An Attorney To Give Either a Meaningful Opening Statement Or a Closing Argument In A Jury Trial Is Ineffective Assistance Per Se.

B. Even If It Were Not Per Se Ineffective Assistance, The Failure Of Phelps' Attorney To Make Opening Statement Or Closing Argument To The Jury Was Ineffective Assistance On This Record.

C. Phelps' Claim of Ineffective Assistance Of Trial Counsel Was Properly Pre served For Consideration In Collateral Proceedings.

II. THE DISTRICT COURT ALSO ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING ON PHELPS' CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

III. THE DISTRICT COURT SHOULD HAVE GRANTED PHELPS' PETITION BECAUSE THE STATE TRIAL COURT'S JURY INSTRUCTION NO. 11 VIOLATED THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE.

A. Instruction No. 11 Unconstitutionally Diluted The Due Process Requirement Of Proof Beyond A "Reasonable Doubt."

B. The Issue Of The Correctness Of Instruction No. 11 Was Properly Before The District Court.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| CHARLES ALBERT PHELPS, Petitioner-Appellant, v. GEORGE SUMNER, Director of Prisons, BRIAN McKAY, Attorney General of the State of Nevada, Respondents-Appellees. | No. 85-2377<br>DC #<br>CV-R-84-340-ECR<br>NEVADA (RENO)<br><br>MEMORANDUM*<br>[Filed June 10, 1986] |

Appeal from the United States District Court for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding
Argued and Submitted April 16, 1986
San Francisco, California

Before: SNEED, ANDERSON, and POOLE, Circuit Judges.

Charles Phelps appeals from the district court's denial of his petition for habeas corpus. We remand the entire

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

case to the district court to permit Phelps an election of remedies in accordance with Rose v. Lundy, 455 U.S. 509 (1982).

I.

FACTS AND BACKGROUND

Charles Phelps was convicted in Nevada state court in May 1981 of the crimes of sexual assault, attempted sexual assault, and two counts of lewdness with a child under the age of fourteen years. On direct appeal, Phelps claimed that the stae trial court erred in permitting joinder of the offenses and in admitting an allegedly involuntary statement of confession. The Nevada Supreme Court dismissed the appeal, concluding that joinder was proper under state law and upholding admission of the confession.

Phelps filed a state habeas petition in April 1984, in which he raised four grounds he had not raised on his direct

appeal. Phelps claimed that his court-appointed appellate counsel had refused to raise these issues because he thought they were frivolous. The new issues Phelps raised were that two jury instructions regarding reasonable doubt deprived him of a fair trial and shifted the burden of proof to petitioner; that the trial court made improper remarks about petitioner during the trial and intimidated the jury into finding petitioner guilty; and that his trial counsel rendered him ineffective assistance. As to the ground of ineffective counsel, Phelps stated that he asked his trial counsel to make a motion for discovery before trial, to move to suppress hearsay evidence, to investigate the statement Phelps had made without an attorney, and to object to the testimony of a detective and his ex-wife as being perjurious. The state court denied the habeas petition, stating that all of the

issues raised could have been raised on direct appeal and that no cause had been shown for failure to raise them on appeal. The Nevada Supreme Court affirmed.

Phelps then filed a federal habeas petition. Phelps raised the two grounds previously raised on his direct appeal to the state supreme court -- improper joinder of offenses and admission of the allegedly involuntary statement -- as well as the issues he had raised in his state habeas petition.

The magistrate and the district court ruled on the merits of the two claims Phelps had raised on direct appeal to the state supreme court. The district court also determined that the remaining claims were barred due to procedural default but made a ruling on the merits of the claims in any event.

Phelps now appeals to this court, claiming that the district court below

erred in (1) failing to hold an evidentiary hearing; and (2) determining that the jury instructions given at Phelps' state court trial did not violate his constitutional rights. Phelps also appeals his claim of ineffective assistance of trial counsel on a basis not raised before any other court -- that his trial counsel failed to provide either a meaningful opening statement or a closing argument.

II.

ANALYSIS

Although Phelps raises his claim of ineffective assistance of counsel before this court on new grounds, we need not ignore it. "In this circuit, '[i]ssues not raised below will generally not be considered on appeal,' although a court 'may exercise [its] discretion to hear such an issue in some narrow circumstances.'" Kathy B. Enterprises v. United States, 779 F.2d 1413, 1415 (9th Cir. 1986) (per curiam) (quoting Grauvogel v. Commissioner, 768 F.2d 1087, 1090 (9th Cir. 1985)).

Our treatment of Phelps' claim must follow the Supreme Court's direction in Rose v. Lundy, 455 U.S. 509 (1982). When a claim not raised in state court appears in a federal habeas corpus petition, the petition is "mixed." As Justice O'Connor stated in Rose,

> Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Rose, 455 U.S. at 510.

We therefore remand to the district court to permit Phelps to return to state court to exhaust his new claim of ineffective assistance of counsel or to amend and resubmit the habeas petition so as to present only exhausted claims to the district court.

REMANDED.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| CHARLES ALBERT PHELPS, Petitioner-Appellant, v. GEORGE SUMNER, Director, of Prisons, BRIAN McKAY Attorney General of the State of Nevada, Respondents-Appellees. | No. 85-2377<br>DC #<br>CV-R-84-340-ECR<br>NEVADA (RENO)<br><br>[Filed July 3, 1986] |

ORDER

Before: SNEED, ANDERSON, and POOLE, Circuit Judges.

Appellees' petition for rehearing is denied.

## APPENDIX G

Rule 2(c), 28 U.S.C. fol. § 2254, provides, in pertinent part, as follows:

> The petition . . . shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified.

Rule 4, 28 U.S.C. fol. § 2254, provides, in pertinent part, as follows:

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 8(a), 28 U.S.C. fol. § 2254, provides, in pertinent part, as follows:

> If the petition is not dismissed at a previous stage in the proceedings, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required.

Rule 9(b), 28 U.S.C. fol. § 2254, provides as follows:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

EDITOR'S NOTE

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No. 86-291

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

GEORGE SUMNER, DIRECTOR,
NEVADA DEPARTMENT OF PRISONS,
Petitioner,

v.

CHARLES ALBERT PHELPS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF IN OPPOSITION

JEFFREY M. EVANS, ESQ.

Suite 542
350 South Center Street
Reno, Nevada 89501
702-786-4048

Attorney for Respondent

## QUESTION PRESENTED

Whether in a habeas appeal, a federal court of appeals may take cognizance of an unexhausted claim of ineffective assistance of counsel for the first time on appeal and then, avoiding the merits, remand the case for disposition in accordance with Rose v. Lundy, 455 U.S. 509 (1982).

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## STATUTORY PROVISION INVOLVED

In addition to those provisions set forth in the petition for a writ of certiorari, Respondent designates the following statute as also involved in this case:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (1982).

## STATEMENT OF THE CASE

In the proceedings below, Respondent Phelps attacked the legality of his state conviction in habeas corpus proceedings pursuant to 28 U.S.C. § 2254. Phelps was convicted on April 9, 1981, after a four-day jury trial in which he was represented by an appointed attorney, deputy public defender James Lucas. Uncontradicted medical testimony at the state trial indicated that Respondent suffered brain damage at birth, is classified as "borderline mentally retarded", and "has trouble getting his thoughts organized and expressing himself."

Despite the serious felony charges Respondent was facing, Lucas gave only a 100-word opening. After the close of the evidence, the prosecutor gave his summation, attacking the credibility of defense witnesses and inviting the jurors to "experience the fears," the "reprehensible predicament," and the "violation" of the complaining witness. The very last thing the prosecutor told the jury was, "It's now Mr. Lucas' time to speak for the defense." The following exchange between the court and Lucas then took place in the jury's presence:

> MR. LUCAS: Your Honor?
>
> THE COURT: Yes?
>
> MR. LUCAS: I waive.
>
> THE COURT: You are going to waive any further argument?
>
> MR. LUCAS: That's correct.
>
> THE COURT: You are not going to make any closing argument?

MR. LUCAS: None.

THE COURT: All right.

The case was submitted to the jury, which returned a guilty verdict later that day.

Respondent appealed to the Nevada Supreme Court, which dismissed the appeal on December 20, 1981. In March 1984, Respondent filed a habeas corpus petition in the district court containing unexhausted claims. The district court dismissed the petition without prejudice so that Respondent could return to state court to exhaust those claims. The state trial court denied that petition on May 11, 1984, and the Nevada Supreme Court refused to hear an appeal on July 20, 1984. Respondent then filed the instant petition in the federal district court on August 15, 1984. His petition contained the claim that his trial attorney had rendered ineffective assistance of counsel. Respondent did not, however, plead that his attorney was ineffective specifically in that he had failed to make a meaningful opening statement or any closing argument. Throughout proceedings in the district court, respondent was acting pro se.

On July 15, 1985, the district court denied the petition. Respondent appealed to the court of appeals, which appointed undersigned counsel. On appeal, counsel raised the new argument that Respondent had been denied effective assistance because deputy public defender Lucas failed to give any summation to the jury and had given only a perfunctory opening. Petitioner argued in the court of appeals that Respondent could not raise this claim for the first time on appeal.

In an unreported memorandum decision, the court took cognizance of the claim, saying "Although [Respondent] Phelps raises his claim of ineffective assistance of counsel before this court on new grounds, we need not ignore it." Phelps v. Sumner, No. 85-2377, Memorandum [Opinion] (9th Cir., filed June 10, 1986). Citing Rose v. Lundy, 455 U.S. 509 (1982), however, the court of appeals did not reach the merits of the claim. It instead remanded the case to the district court to permit Respondent Phelps "to return to state court to exhaust his new claim of ineffective assistance of counsel or to amend and resubmit the habeas petition to be to present only exhausted claims." Id.

Petitioner subsequently requested that the matter be reheard, and the court of appeals denied that request on July 3, 1986.

## REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT OF SUFFICIENT MOMENT TO WARRANT REVIEW BY THIS COURT.

By Rule 17, this Court exercises its discretion to grant review by certiorari only when "there are special and important reasons" for doing so. No such reasons exist in this case.

Whether correct or erroneous, the decision below has no importance beyond the parties involved. The decision of the Court of Appeals for the Ninth Circuit is an unreported memorandum opinion. Under the local rules of that Circuit, the decision is entitled to no value as a precedent. "A disposition that is not for publication shall not be cited to or by this Court

or any district court of the Ninth Circuit, either in briefs, oral arguments, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." Rule 21(c), Rules of the United States Court of Appeals for the Ninth Circuit. Because the decision below has no value as a precedent, its effects are confined to the parties at bar and do not extend to the legal system generally. Respondent submits that for this reason alone, review of this case by the Court should be denied.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner asserts that the decision below is "clearly in conflict with this Court's previous decisions." Petition For A Writ Of Certiorari at 16. Petitioner is wrong.

In the district court, Respondent filed a habeas corpus petition raising a number of claims. One of those was a claim that his trial attorney, a public defender, rendered ineffective assistance. He specified some ways in which he believed his trial attorney was ineffective. After denial of his habeas petition, appellate counsel advanced a new reason why Respondent was denied effective assistance of counsel: his trial attorney's failure to give a closing argument in a jury trial. The court of appeals allowed this issue to be raised for the first time on appeal.

Had the court of appeals proceeded to decide Respondent's newly raised claim, it would have violated the rule of Rose v. Lundy, 455 U.S. 509 (1982), which requires that unexhausted claims be presented in state court before federal review is available. Instead, the court disposed of

the matter exactly as required by Rose v. Lundy. Since Respondent had not exhausted his claim of that trial counsel was ineffective in failing to make a closing argument, the court remanded the case to give Respondent the opportunity to take a voluntary dismissal of the habeas petition and return to state court to exhaust that claim. See Rose, 455 U.S. at 510. This disposition is consistent with Rose v. Lundy.

Petitioner also claims that the decision below was contrary to Strickland v. Washington, 466 U.S. 668 (1984) and Hill v. Lockhart, ___ U.S. ___, 106 S. Ct. 366 (1985). The easy answer to that contention is that neither of those cases dealt with the question presented in this case: whether a Court of Appeals may take cognizance of an unexhausted claim for the first time on appeal and then, avoiding the merits, remand the case for disposition in accord with Rose v. Lundy. To Respondent's reading of the cases, Strickland and Lockhart simply do not address this question.

III. THIS COURT HAS TRADITIONALLY LEFT THE COURTS OF APPEALS FREE TO DETERMINE FOR THEMSELVES WHICH ISSUES THEY WILL ENTERTAIN FOR THE FIRST TIME ON APPEAL.

Petitioner claims that the decision below is a "radical departure" from "settled appellate procedure." Petition For A Writ Of Certiorari at 20. The settled procedure he refers to is the practice of appellate courts to refuse to consider an issue raised for the first time on appeal. As this Court has previously stated, however, this practice is "not inflexible." Hormel v. Helvering, 312 U.S. 552, 556 (1941).

The so-called "radical departure" from "settled practice" is merely the type of decision this Court has traditionally left to the discretion of

the courts of appeals in the day-to-day administration of thier dockets. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 121 (1976).

To the best of Respondent's knowledge, this Court has not previously identified the source of this discretion possessed by the courts of appeals. Arguably, it might stem from a respect on the part of the Members of this Court toward the operations of the lower federal courts or from a disinclination to become involved in their daily administration. In any event, the discretion to allow issues to be raised for the first time on appeal appears to be Congressionally conferred on the courts of appeals. Congress has authorized courts of appeals to dispose of cases before them "as may be just under the circumstances." 28 U.S.C. § 2106 (1982). See also Hormel v. Helvering, 312 U.S. 552, 555-56 (1941).

The court of appeals could reasonably have found this case to be one calling for a discretionary exception to the general policy against allowing new issues on appeal. As part of the record on appeal, the court had before it a transcript of the state trial at which Respondent was convicted. Undisputed expert medical testimony at that trial indicated that Respondent is organically brain-damaged and borderline mentally retarded. When he filed his habeas petition in the district court, Respondent was acting pro se. Although he pleaded ineffective assistance as a ground for relief in his petition, he did not allege specifically that his state trial

attorney was ineffective in that he failed to give a closing argument in a jury trial. The district court denied his petition, and Respondent appealed. The court of appeals then appointed undersigned counsel to represent Respondent. With counsel now representing him, Respondent raised the issue of his trial attorney's failure to give a closing argument and argued that, on the record before the court of appeals, he had been denied effective assistance under the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984). The court of appeals, although ultimately declining to decide the issue, heard argument on the merits of the claim. Given its view of the merits and its reading of the record, Respondent submits, the court did not abuse its discretion by allowing the claim to be raised on appeal for the first time.

Petitioner apparently believes that this Court should narrow the discretion of the courts of appeals because otherwise there "will result . . . an unnecessary increase in workload for courts" and may result in "the withholding of habeas claims until appeals." Petition For A Writ Of Certiorari at 26. To suggest that the decision below will result in any significant increase in the burden on state and federal courts is pure speculation. Petitioner has not shown that courts of appeals generally favor allowing habeas petitioners to raise new issues on appeal. Absent such an inclination, the case where a court of appeals allows such an issue to be raised should be rare.

The fear that habeas petitioners will intentionally forego asserting a claim for relief in the district court for the purpose of raising it as a

surprise on appeal is similarly unfounded. The self-interest of habeas petitioners dictates that they not risk losing a claim by intentionally failing to raise it. The more likely case where an appeals court will be willing to allow a new claim on appeal, it is submitted, is when the claim is perceived as meritorious, but was not raised below because the habeas petitioner was acting pro se and, as in this case, appears to be mentally handicapped. Allowing the occasional, possibly meritorious claim that fits this pattern to be raised for the first time on appeal is appropriate to mitigate the harshness of legal rules as they apply to pro se, often mentally impaired litigants. After all, as this Court has observed, the "primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned." Price v. Johnston, 334 U.S. 266, 291 (1948). A rule of practice, such as that prohibiting the raising of new issues on appeal, "should not be applied where the obvious result would be a plain miscarriage of justice." Hormel v. Helvering, 312 U.S. 552, 556 (1941). The court of appeals in this case reviewed the record, heard the argument of counsel regarding the merits of the ineffective assistance claim and whether it could be raised on appeal, and exercised its discretion in favor of allowing the claim to be raised (although not decided). The court did not state its reasons, but Respondent submits that the decision probably rested on the court's view of the merits of the claim and on considerations of fairness.

Exceptions to the general policy against the raising of issues for the first time on appeal should be left to the discretion of the courts of

appeals. To the extent that the granting of the writ of certorari in Petty v. McCotter, 779 F.2d 299 (5th Cir. 1986), cert. granted, 54 U.S.L.W. 3859 (June 24, 1986), involves this Court in reviewing the exercise of the discretion of courts of appeals in this area, Respondent submits that the writ was improvidently granted.

IV. THE DECISION BELOW DOES NOT DENY PETITIONER THE ABUSE OF THE WRIT DEFENSE UNDER RULE 9(b), 28 U.S.C. fol. § 2254

Petitioner argues that under the decision below, if Respondent takes a voluntary dismissal of his habeas petition, exhausts his claim of ineffective assistance in state court, and then files a successive petition raising that claim, Petitioner will be unable to assert the technical defense of "abuse of the writ." See Petition For A Writ Of Certiorari at 25, citing Rule 9(b), 28 U.S.C. fol. 2254. How Petitioner reaches this conclusion is unclear.

The petitioner in McCotter v. Petty, now pending before this Court, has taken the same position, claiming an unfair loss of the "abuse of writ" defense:

> By remanding to allow Petty to amend his petition to include allegations first made in the appellate court, the opinion unfairly deprives the state of its abuse defense. Because there has been no appellate review of the judgment of the district court, there is no finality to that court's review on the merits, and thus Petty's amended petition would not be subject to dismissal for abuse.

McCotter v. Petty, No. 85-1656, Brief of Petitioner at 23. The assumption of the petitioner in McCotter, and of Petitioner in this case, appears to be that the "abuse of writ" defense is available only when an earlier habeas petition has been decided on the merits. That assumption is not correct.

however.

A prior disposition on the merits is not a prerequiste to asserting the defense. If Petitioner returns to state court, exhausts his claim, and files a new petition, the "abuse of writ" defense will be available. Rule 9(b) of the Section 2254 Rules provides as follows: "A second or successive petition may be dismissed if the judge finds that new and different grounds are alleged, [and] the judge finds that the failure to allege those grounds in a prior petition constituted an abuse of the writ." Rule 9(b), 28 U.S.C. fol. § 2254. Rule 9(b) requires only that there be a "prior petition" before the defense can be raised; it does not require that the prior petition be decided on the merits. Thus, the disposition of the court of appeals on a basis other than the merits will not prevent Petitioner from asserting the defense when and if Respondent files another federal habeas petition.

CONCLUSION

For the above reasons, Respondent requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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